

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-210798

DATE: April 1, 1983

MATTER OF: B.H. Aircraft Company, Inc.

DIGEST:

1. Allegation of anti-trust violations is for consideration by the Attorney General, not GAO.
2. The possibility of a buy-in does not furnish a ground on which to protest a contract award.
3. A contract award necessarily includes a finding by the contracting officer that the awardee is responsible. GAO will not review an affirmative determination of responsibility absent a showing of fraud or an allegation that definitive responsibility criteria were misapplied.
4. Protest that solicitation did not contain a necessary enclosure goes to an impropriety in the solicitation. GAO therefore will not consider such a protest unless it is filed before the closing date for receipt of initial proposals.

B.H. Aircraft Company, Inc. protests the award of a contract to N.V. Philips under solicitation F41608-82-R-7254 issued by the Department of the Air Force for engine spare parts. B.H. Aircraft claims that the award to N.V. Philips was improper because of alleged anti-trust violations, the possibility of a buy-in, and the Air Force's failure to follow the regulations which govern how offeror responsibility should be determined. B.H. Aircraft also complains that the Air Force did not attach a required enclosure to the solicitation.

We dismiss the protest.

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B.H. Aircraft first alleges that N.V. Philips and another supplier of engine spare parts are violating the anti-trust laws. Consideration of alleged anti-trust violations, however, is for the Attorney General, not our Office. McQuiston Associates, B-199013, September 1, 1981, 81-2 CPD 192. We therefore dismiss this ground of protest.

B.H. Aircraft next suggests that N.V. Philips' offer reflects an attempt at "buying in" in that it allegedly is a below-cost offer in violation of Defense Acquisition Regulation (DAR) § 1-311 (1976 ed.).

The possibility of a buy-in, however, is not a proper basis upon which to challenge a contract award, since there is nothing inherently illegal about a buy-in. Swiss-Tex Incorporated, B-200809, B-200810, October 31, 1980, 80-2 CPD 333. Indeed, DAR § 1-311 does not prohibit award based on a below-cost offer, but only cautions that where there is reason to believe that a responsible firm has "bought-in" the contracting officer should assure that amounts the contractor excluded in developing its price are not recovered in the pricing of change orders or otherwise. See Tombs & Sons, Inc., B-206810.2, May 10, 1982, 82-1 CPD 447. The protest on this issue is dismissed.

The third ground of B.H. Aircraft's protest is that the Air Force violated DAR § 1-905.3 by failing to request status reports regarding investigations of N.V. Philips and the other supplier which were being conducted by the Defense Audit Service and the Justice Department at the time the contract was awarded. The regulation lists sources, such as "Government departments and agencies," from which information concerning an offeror should be obtained in connection with determining whether the firm is responsible, that is, capable of performing the contract.

The award of a Federal contract necessarily includes a finding that the awardee is responsible. DAR § 1-902; Warfield & Sanford, Inc., B-206929, April 20, 1982, 82-1 CPD 365. This Office will not review a contracting officer's determination that a prospective contractor is responsible unless the solicitation contains definitive

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responsibility criteria which allegedly have not been applied or there is an allegation of fraud or bad faith on the part of contracting officials. Kenilworth Trash Company, B-207314, May 18, 1982, 82-1 CPD 480. Since neither exception applies here, we will not consider the protester's complaint about the scope of the contracting officer's responsibility investigation.

Finally, B.H. Aircraft complains that the solicitation did not contain an enclosure referenced in the solicitation as attached. This allegation, however, relates to a solicitation impropriety which was apparent before the closing date for the receipt of initial proposals, and a protest on such a ground must be filed before that date. 4 C.F.R. § 21.2(b)(1) (1982). Since this protest was not filed until after an award had been made, it is untimely.

The protest is dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel